ST 97-24
Tax Type: SALES TAX
Issue: Unreported/Underreported Receipts (Fraud)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
	)	NO.
	)	IBT.
v.	)	NTL.
	)	
TAXPAYER	)	Administrative Law Judge Daniel D. Mangiamele
Taxpayer	)	

RECOMMENDATION FOR DISPOSITION

Appearances:

Martin L. Schwartz and Associates on behalf of the taxpayer; John Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue.

Synopsis:

This is a case involving TAXPAYER an Illinois Corporation (hereinafter referred to as "Taxpayer"). The Department claims that Retailer's Occupation Tax is due and owing to the Department from TAXPAYER in the amount of $75,916.00 in tax, penalty and interest for the tax period January 1, 1990 through November 30, 1993. The issue raised is whether the taxpayer underreported gross receipts and whether the fraud penalty was properly assessed.

An Administrative hearing was held on December 20, 1995. It is recommended that the above issues be determined in favor of the Department of Revenue.

Finding of Facts:

1. The Department of Revenue offered the following exhibits into evidence under the Certification of the Director as Dept. Group Ex. No. 1.

a. Correction and or Determination of tax due for the period 1/1/90 through 11/30/93.

b. Notice of Tax Liability NTL XXXXX issued on June 20, 1994 in the amount of $75,916.00. Tr. p. 14

2. The parties stipulated that the gross purchases for June 1992 are to be reduced by $41.000. Tr. pp. 12-13

3. Taxpayer's business suffered burglaries. Tr. p. 26

4. Police reports were made of break-ins on approximately 26 occasions. Tr. pp. 74-75

5. An examination of the alleged police burglary reports contained in taxpayer's Ex. No. 2 contain the following information:

a. Some of the reports contain information concerning minor shoplifting charges of items such as Tylenol tablets, cupcakes, corn starch, orange juice, box of pampers, furniture polish and groceries.

b. The burglary reports involved the theft of a 38 Cal-Revolver, miscellaneous cigarettes, liquor, unidentified merchandise, and unknown amounts of U.S. currency.

c. One report contained information on a small rubbish fire on the premises. Taxpayer Ex. No. 2

6. Taxpayer kept no records of his merchandise losses which occurred during the break-ins. Tr. p. 72

7. Taxpayer kept no inventory records of his stock. Tr. p. 85

8. The fraud penalty was based on the significant difference between sales reported by taxpayer and sales as determined from auditor's examination of liquor purchases. Tr. p. 105

9. The dollar amount paid for liquor purchases exceeds by over 150 percent the amount of liquor sales in each of the years contained in the audit period. Tr. p. 104

Conclusions of Law:

Issue No. 1

The first issue to be addressed is whether the taxpayer overcame the Department *prima facie* case which included a fraud penalty. 35 ILCS 120/4 states in pertinent part as follows:

> Sec. 4. As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information, which return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.
>
> If the tax computed upon the basis of the gross receipts as fixed by the Department is greater than the amount of tax due under the return or returns as filed. The Department shall [or if the tax or any part thereof that is admitted to be due by a return or returns, whether filed on time or not, is not paid, the Department may] issue the taxpayer a notice of tax liability for the amount of tax claimed by the Department to be due, together with a penalty of 10% thereof: Provided, that if the incorrectness of any return or returns as determined by the Department is due to fraud, said penalty shall be 30% of the tax due...
>
> Proof of such notice of tax liability by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy of the Department's record relating thereto in the name of the Department under the Certificate of the Director of Revenue. Such reproduce copy shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be *prima facie* proof of the correctness of the amount of tax due, as shown therein. [Emphasis Added]

Once the Corrections of Returns or Determination of Tax due were admitted into evidence, the amount of tax and penalty established by said corrected returns was deemed *prima facie* true and correct. The Department having established its case, the burden shifted to the taxpayer to overcome it by producing competent evidence as identified with taxpayer's books and records. Masini v. Department of Revenue, 60 Ill. App. 3d 11, 376 N.E. 2d 324 (lst Dist. 1978). In the instant case, no competent documentary evidence was proffered on behalf of the taxpayer. Thus, the taxpayer failed to prove the Department's corrected returns were incorrect, and the amounts established by said returns, therefore, remain as true and correct.

On examination of the record established, taxpayer has failed to demonstrate by the presentation of testimony or through exhibits or argument, evidence sufficient to overcome the Department's *prima facie* case of tax liability under the assessments in question.

Taxpayer testified that the Department auditor failed to speak to him or his employees while conducting the audit. I find that argument mere rhetoric since the taxpayer offered no documentary evidence to support his protest. The only evidence offered was taxpayer's testimony that his business is in a high crime area and that he was burglarized over fifty times during the audit period. He further offered as corroboration of his testimony certain police reports admitted as taxpayer's Exhibit No. 2. An examination of this exhibit reflects that there were two burglaries wherein the burglar took a revolver and unspecified or unknown currency and liquor. The remaining police reports were small shoplifting charges as described in the findings of fact. Taxpayer further testified he kept no inventory records nor did he have any records of what was stolen. The Department auditor cannot perform an audit where a taxpayer keeps no inventory records for his business or where there is a burglary and no inventory taken of missing or stolen items. Mere argument

without some documentary evidence to substantiate the taxpayer's claim that the *prima facie* case was prepared incorrectly is not sufficient. Quincy Trading Post v. Department of Revenue 12 Ill. App. 3d 725, 298 N.E. 2d 789 (1973). Taxpayer clearly did not provide sufficient evidence to overcome the Department's *prima facie* case

In regard to the audit method utilized, the Department need only show that it prepared the corrected return pursuant to some minimum standard of reasonableness. In this matter the taxpayer failed to perform its statutory duty to keep adequate books and records regarding its Retailers' Occupation taxes warranted the Department's assumption that taxes were not appropriately reported. Absent taxpayer's production of evidence identified with books and records to support its claim of non-liability, this method is patently the best method, for exceeding the requisite minimum standard of reasonableness. The auditor's testimony together with evidence upon which taxpayer was found not to have kept requisite books and records of inventory or loss by theft established a *prima facie* case of reasonableness of the method and propriety of the Department's corrected tax returns and displayed the insufficiency of the taxpayer's rebuttal without documentary support. Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1987).

The Departments audit was concluded based on the information taxpayer supplied. The testimony received into evidence that taxpayer did not produce all records stands unrebutted. 35 ILCS 120/7 states in pertinent part as follow:

> Sec. 7. Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents. Every person who is engaged in the business of selling tangible personal property at retail

in this State and who, in connection with such business, also engages in other activities (including but not limited to, engaging in a service occupation) shall keep such additional records and books of all such activities as will accurately reflect the character and scope of such activities and the amount of receipts realized therefrom.

All books and records and other papers and documents which are required by this Act to be kept shall be kept in the American language and shall, at all time, during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.

To support deductions made on the tax return form, or authorized under the Act, on account of receipts from isolated or occasional sales of tangible personal property for resale, on account of receipts from sales to governmental bodies or other exempted types of purchasers, on account of receipts from sales of tangible personal property in interstate commerce, and on account of receipts from any other kind of transaction that is not taxable under this Act, entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date of every such transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the nontaxable character of such transaction under this Act.

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable. In the course of any audit or investigation or hearing by the Department with reference to a given taxpayer, if the Department finds that the taxpayer lacks documentary evidence needed to support the taxpayers claim to exemption from tax hereunder, the Department is authorized to notify the taxpayer in writing to produce such evidence, and the taxpayer shall have 60 days subject to the right in the Department to extend this period either on request for good cause shown or on its own motion from the date when such when such notice is sent to the taxpayer by certified or registered mail [or delivered to the taxpayer if the notice is served personally] in which to obtain and produce such evidence for the Department's inspection, failing which the matter shall be closed, and the transaction shall be conclusively presumed to be taxable hereunder...[Emphasis Added]

The taxpayer admitted they did not keep records of their inventory, nor did they take inventory after the break-ins. Therefore losses from burglaries

cannot be substantiated nor could the Department auditor allow credit for the alleged stolen inventory. I therefore find taxpayer not to be in compliance with Section 120/7.

Taxpayer has failed to demonstrate through testimony, exhibits or argument any evidence to overcome the Department's *prima facie* case establishing tax liability herein. Accordingly, the amounts set forth in the corrected returns stand unrebutted and correct. On the foundation of the foregoing findings of fact and conclusions of law, it is therefore recommended that the Correction of Returns including the fraud penalty be finalized as issued with the exception that the gross purchases for June 1992 are to be reduced by $41,000.00 in accordance with the parties stipulation.

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Daniel D. Mangiamele
Administrative Law Judge